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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LADRAIRO PENNIX, Defendant and Appellant.	B207816 (Los Angeles County Super. Ct. No. VA100535)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Dewey Lawes Falcone, Judge. Affirmed.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

SUMMARY

A jury convicted Ladrairo Pennix, who represented himself, of second degree robbery (Pen. Code, § 211), and Pennix admitted two prior convictions for which he served prison terms (Pen. Code, § 667.5, subd. (b)). The trial court struck one of the prior convictions, and sentenced Pennix to six years in state prison (the upper term of five years for the robbery with a one-year enhancement for the prior prison term). On appeal, Pennix's counsel filed a brief requesting this court's independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436. Our review of the record shows no arguable issues, and we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On April 11, 2007, shortly before noon, Pennix and co-defendant Gean Windom were on a bus in Los Angeles, sitting in front of Antonio Fernandez. Pennix, an African-American who weighed more than 400 pounds, was wearing a gold chain with a round pendant; his hair was in corn rows. Fernandez got off the bus near the intersection of Florence and Holmes and went into a market, leaving his bicycle outside. He purchased some beer, then walked to the corner, got on his bicycle, and started pedaling across the intersection. As he crossed the intersection, Fernandez saw Pennix and Windom coming toward him. Pennix, who had his arms crossed in front of himself, knocked Fernandez off his bicycle to the ground. Pennix and Windom then beat Fernandez and took Fernandez's wallet from his back pocket. Fernandez's elbows were lacerated and the back of his head was bloody; he said he had about $140 in his wallet.

In addition to the victim, there were two other witnesses to the robbery who identified Pennix. Abdon Mercado was in his car near the intersection, waiting for a red light to change, when he saw Pennix and Windom knock Fernandez off his bike. Mercado drove off, then made a U-turn and drove back to the intersection. He alerted police officers who were passing by in a black-and-white cruiser. Officer Azam Flores and his partner, Roger McNichols, saw Fernandez on the ground in the middle of the crosswalk. Fernandez told the officers that two male blacks, both wearing white T-shirts

and one of whom was really fat, had knocked him off his bicycle, beaten him, and taken his wallet and money. Another witness, Jose Corzo, was at the bus stop when he saw Pennix and Windom attack Fernandez. He pointed the police in the direction Pennix and Windom had taken, and gave chase himself; Corzo was at the carwash up the street when Pennix and Windom were arrested. After Pennix was taken into custody, Fernandez identified him. The police recovered $74 from Windom.

Pennix was charged by information with second degree robbery. The information also alleged that Pennix suffered two prior convictions for which he served prison terms (violations of Vehicle Code section 10851 [driving or taking a vehicle without the owner's consent] and Penal Code section 484 [theft]) and did not remain free of prison custody for (and committed an offense resulting in a felony conviction during) the five-year period after the conclusion of his term.

On June 28, 2007, Pennix asserted his right to represent himself, and the court, after a brief inquiry, relieved the public defender.[1] During the ensuing months prior to the trial in March 2008, Pennix made three *Pitchess* motions. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) The first two (July 26, 2007 and September 5, 2007) sought confidential personnel records of Officers Flores and McNichols; the third (January 22, 2008) sought records for Deputies Flint and Reynaga as well as those of Flores and McNichols. The Sheriff's Department opposed the motions, pointing out that civilian witnesses, not the deputies, observed the attack on the victim, so there was no basis for

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[1] The court (Judge Pro Tem Michael Schuur) asked Pennix if he had ever represented himself before, and Pennix said he had represented himself once in 2003 and twice in 2002, and was "three and 0." The court observed, "So, I don't really have to tell you about the law library and the jail and all that. You know how it works; right?" and Pennix responded, "You don't have to tell me." The court then advised Pennix that he was at a disadvantage representing himself, and that he (the court) had been a lawyer for 20 years, "and if I was sitting where you were at I wouldn't represent myself, and I know something about the law, right?" Pennix said that he still wanted to represent himself, and the court then relieved the public defender.

obtaining records relating to fabrication and planting of evidence, and other bases such as racial prejudice, excessive force, and dishonesty were either immaterial to any defense to the charge or lacking in specificity. The motions were denied for lack of good cause on August 21, 2007 and October 26, 2007 (Judge Schuur), and on January 23 and February 22, 2008 (Judge Falcone).[2] Judge Falcone observed that, except for the addition of two other officers, the third motion was the same as the prior motion, with nothing that tied the other officers into any incidents of excessive force, fabrication of probable cause, planting of evidence, or the like.

On March 24, 2008, the day before the trial began, the prosecution repeated its plea offer of three years in state prison (increasing to four years if the court were to order a jury panel), as against potential exposure of seven years. The offer was declined.

Pennix subpoenaed his co-defendant, Gean Windom, to testify. Windom had entered a guilty plea in June 2007, but had not yet been sentenced. Windom appeared on the first day of Pennix's trial with his lawyer and asserted his Fifth Amendment right not to answer questions on the ground the answers might tend to incriminate him. Windom acted on the advice of his lawyer, who told the court Windom's plea was an open plea, and Windom might make statements that could affect the sentence he would receive. The court concluded Windom's Fifth Amendment claim was valid.

At trial, evidence was adduced as described above. The defendant testified in his own defense. He said that he was on the bus alone; got off the bus at Florence; and went to the restaurant at the carwash. As he left the restaurant, he heard someone go past him quickly, and then guns were pointed at him and he was arrested. Pennix explained that he weighed over 400 pounds, had weak ankles, an occluded tendon, flat feet, an injured right knee, and second degree bronchitis, all of which would have prevented him from running

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[2] The record contains only three *Pitchess* motions; apparently the court's denials of January 23 and February 22, 2008, were both addressed to the motion filed in January.

anywhere. Pennix also presented testimony from Dr. Ralph Geiselman, a professor of psychology at UCLA, who explained why identifications can be unreliable.

The jury found Pennix guilty, and Pennix admitted the two prior convictions for which he served prison terms. The trial court struck one of the prior convictions and sentenced Pennix to six years in state prison, selecting the upper term of five years for the robbery with a one-year enhancement for the prior prison term. As the basis for the upper term, the court found there were no circumstances in mitigation and several circumstances in aggravation under rule 4.421 of the California Rules of Court:

> "The crime did involve acts of viciousness and callousness, the court noting two people involved, the perpetrators involved, the victim was particularly vulnerable. He was on a bicycle in a crosswalk, knocked off the bicycle, very difficult in any way for him to defend himself. [¶] Third, the manner of the crime indicates some level of professionalism or planning in that the victim was noticed on the bus, the victim gets off the bus, the defendant then and his partner get off the bus at the next stop and walk back to where the victim was to catch him on his bike. There's a quick assault. The beating. The quick taking of the money and the fleeing. So those circumstances do indicate to the court that there was planning and professionalism regarding the commission of the crime. [¶] In addition, the defendant was on parole at the time of the crime."

Pennix was credited with 410 days in custody (357 days actual custody and 53 days good time/work time). The court further ordered Pennix to pay a restitution fine of $1,000 (Pen. Code, § 1202.4, subd. (b)); a parole revocation restitution fine (stayed) of $1,000 (Pen. Code, § 1202.45); and a $20 court security fee (Pen. Code, § 1465.8), and to provide buccal swab samples, thumbprints, and other samples as required under Penal Code section 296.

Pennix filed a timely appeal, and we appointed counsel to represent him. Pennix's appointed counsel filed a brief pursuant to *People v. Wende*, *supra*, 25 Cal.3d 436, setting forth the facts of the case but raising no specific issues. In response to notice from his counsel of his right to file a supplemental brief, Pennix submitted a seven-page brief.

DISCUSSION

We have reviewed the entire record and Pennix's written contentions and have found no arguable issue. The evidence of guilt was overwhelming, and no error appears in the trial court's sentencing decision. Pursuant to the United States Supreme Court's application of the Sixth Amendment in *Cunningham v. California* (2007) 549 U.S. 270, the middle term under California's determinate sentencing law (DSL) was the maximum term that could be imposed upon the basis of the jury's verdict alone. However, a subsequent revision of the DSL, signed into law on March 30, 2007, states that the trial court "shall select the term which, in the court's discretion, best serves the interests of justice." (Pen. Code, § 1170, subd. (b).) Our Supreme Court has concluded that trial judges are no longer constrained by the *Cunningham* rule cited above. (*People v. Sandoval* (2007) 41 Cal.4th 825, 843-845.) As now required by section 1170, subdivision (b), the trial court, at Pennix's sentencing on April 2, 2008, "set forth on the record the reasons for imposing the term selected . . . ," and we see no abuse of the court's discretion.

Pennix presents three claims in his supplemental brief.

First, Pennix asserts that the sentencing of co-defendant Gean Windom was postponed for seven months, until after Pennix's trial, as a tactical maneuver to prevent Windom from testifying on Pennix's behalf. But we know of no authority or rule of law entitling a criminal defendant to challenge the timing of events in another criminal case. Moreover, when Windom appeared at Pennix's trial, Pennix made no offer of proof with respect to Windom's testimony. In any event the evidence in this case was such that, even if Windom testified as Pennix now claims he would have done, there is no reasonable probability the jury would have reached a different verdict. (Cf. *People v. Whitson* (1998) 17 Cal.4th 229, 251.)

Second, Pennix contends the trial court (Judge Falcone) abused its discretion in its refusal to appoint certain expert witnesses. On March 5, 2008, the court refused to appoint an expert in neurophysiology and psychology. (Judge Schuur had appointed a

neurologist in October 2007, but the expert appointed declined to act a few days after receiving the appointment.) Pennix said he needed a neurological or psychological expert "for the problems with interracial identifications," and "recollection, the perception, stress on eye witness perceptions." Judge Falcone found there was no showing of good cause for an expert of that type. We see no error in Judge Falcone's ruling (and in any event, a psychologist, Dr. Geiselman, ultimately testified as a defense witness on identification issues). Pennix also claims the court erred in denying his motion for a medical examination, asserting he would have been able to show he was physically unable, because of his weight and other medical conditions, to participate in the crime as described by the witnesses. The trial court denied the motion, saying the subject matter was not appropriate for expert testimony, as "all a jury has to do with is to look at you," and "the jury doesn't need a doctor to say whether or not you can or cannot do certain things . . . ." The court also observed Pennix could raise the issue with police officers on cross-examination. Again, we perceive no error in the trial court's ruling.

Third, Pennix contends that, during the trial, the court made an objection for the district attorney. Pennix does not identify the witness or subject matter of the testimony upon which he bases this claim, but our review of the transcript revealed nothing untoward in the trial court's conduct of the trial. Certainly nothing occurred that could conceivably amount to prejudicial error.

DISPOSITION

The judgment is affirmed

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BAUER, J.*

We concur:

RUBIN, Acting P.J.

BIGELOW, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.